

Basan Bhowmick Vs. State and anr.

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Court : Kolkata

Decided On : Mar-27-1962

Reported in : AIR1963Cal3,1963CriLJ46

Judge : S.K. Sen and ;Amaresh Roy, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 96, 147, 339 and 425

Appeal No. : Criminal Revn. No. 1565 of 1960

Appellant : Basan Bhowmick

Respondent : State and anr.

Advocate for Def. : N.R. Biswas, Adv. for Opposity Party No. 2 and ;S.N. Banerjee, D.L.R.

Advocate for Pet/Ap. : Nalin Chandra Banerjee and ;Arun Kumar Mukherjee, Advs.

Judgement :

Sen, J.

1. The five petitioners Basan Bhowmick and four others were convicted by a Magistrate, First Class, Chandernagore under Sections 147 and 323 and 324 of the Indian Penal Code. In an appeal the learned Sessions Judge, Hooghly set

aside the conviction of the petitioners in respect of the charge under Sections 323 and 324 I. P. C., but he maintained the conviction under Sec. 147 I. P. C. maintaining the sentence of one month's rigorous imprisonment passed by the teamed magistrate on petitioners Nos. 1, 2 and 3 and reducing the sentence passed by the learned magistrate on the petitioners Nos. 4 and 5 to rigorous imprisonment for one month each. The facts of the case are briefly as follows:

2. The complainant Bishnupada Maity and one Krishna Pada Maity who was an accused before the learned magistrate but was acquitted by him, are cousins living in separate but adjoining houses. The complainant Bishnupada has a tank and the tank is also used by Krishnapada and his family. Krishnapada and his family have been claiming the right of way to the tank over the inner courtyard of the house of the complainant Bishnupada Maity, and a dispute has been going on between the parties over this claim. The present occurrence took place on 20th of May, 1959 in the early morning; but previously there had been a row between the parties over the same dispute, i.e. over the attempt of the complainant Bishnupada Maity to block the pathway by erecting a compound wall and the attempt of Krishnapada Maity and his men to keep the Pathway open, and there were a case and a counter-case over that. On 19-5-59 Krishnapada Maity filed a civil suit against Bishnupada and others claiming declaration of the easement right of way over the inner courtyard of the house of the complainant Bishnupada Maity and a permanent injunction restraining the complainant and others from interfering with that right. A temporary injunction was asked for and an interim injunction was obtained ex parte on 19-5-59, But the notice of injunction had not yet been served on the complainant When the present occurrence took place.

3. According to the complainant there was a gap in the compound wall which was built up or rebuilt by masons under his supervision on 19-5-59. On 20-5-59 at about 5 in the morning the accused persons came armed with lathis, pickaxes and spears, and broke the newly built wall and caused hurt to several persons on the side of the complainant who offered resistance. The police were informed and the police took up investigation of the case and submitted charge-sheet for rioting and causing hurt against as many as 13 accused including the five petitioners.

4. The accused all pleaded not guilty, and the defence was that it was not true that the gap in the wall had been filled up by rebuilding that portion of the wall on 19-5-59, but that Bashnupada Maity, having received the information of the suit filed by Krishnapada and the ex parte injunction obtained by him, was trying to frustrate the injunction order by filling up the gap in the wall. It was further stated that the accused party merely chased away the masons and other labourers whom the complainant had procured for filling up the gap in the wall early in the morning of the 20th of May, 1959, and that they did not cause injury to anybody. It was alleged that the injuries proved to have been inflicted on some men of the complainant party, were fabricated.

5. This defence was altogether rejected by the Learned magistrate, who accepted the prosecution version of the case, but he acquitted 8 of the accused on the ground. That it was not proved beyond reasonable doubt that they participated in the riot. As against the five petitioners, the learned Magistrate was satisfied about their participation and about their having caused hurt to various people of the complainant party. So he convicted and sentenced them under Sec. 147 of the Indian Penal Code and Sec. 323 or 324 of the Indian Penal Code.

6. An appeal was heard by the learned Sessions Judge, Hooghly. The learned Sessions Judge held on a consideration of the evidence that it did not appear to be true that on 19-5-59, the day before the occurrence, the new part of the wall closing the gap in the compound wall and so blocking the passage over the inner court yard of the complainant's house, had been built. The learned Sessions Judge was of the view that the complainant got his masons and labourers in the early morning of 20th May to build up a portion of the wall to fill up the gap which existed; but that at that time the accused petitioners and others armed with lathis, pickaxes, spears and other weapons made an attack on them. In the circumstances the learned Sessions Judge was of the opinion that the common object as mentioned in the charge, of demolishing the boundary wall, had not been established. The learned Judge, however, held that the second common object mentioned in the charge namely, to commit assault on the complainant and his men, was proved, and that this was sufficient to sustain a conviction under Sec. 147 of the Indian Penal Code. In respect of the charge under Sections 323 and

324 of the Indian Penal Code, the learned Sessions Judge pointed out that there was discrepancy in the evidence as to who had injured whom, and that, therefore, it would not be safe to maintain the conviction under the specific charges of causing hurt. The learned sessions Judge, therefore, upheld the conviction under Sec. 147 I. P. C., but set aside the conviction under Sections 323 and 324 of the Indian Penal Code.

7. Mr. N. C. Banerjee, appearing for the petitioners, has urged before us that the learned Judge was wrong in the view that even though the primary common object as mentioned in the charge of rioting was not made out, the conviction for rioting could still be maintained by stating that the common object of assaulting the complainant and his men had been made out. There is a decision of a Division Bench of this Court, namely, *Alkasulla v. Emperor* : AIR1936 Cal429 where it was held that where the charge of rioting mentions the common object of forcibly taking possession of the land of the complainant, and on the evidence it is not established beyond reasonable doubt that the land was in the possession of the complainant, so that the object of taking forcible possession of the complainant's land fails, it is not proper to maintain a conviction for rioting with the common object of merely assaulting the complainant and his men, because in such a case the object of taking forcible possession of the complainant's land is the primary object and if that object fails, there should be no conviction, on the basis of the ancillary common object.

8. We must respectfully agree with this decision and hold that in view of the fact that the primary common object as mentioned in the charge, namely, breaking down the compound wall erected by the complainant, has failed, it would not be proper to maintain a conviction on that charge of rioting, by observing that in any case, the common object of assaulting the complainant and his men was established.

9. It appears to be clear, however, from the evidence in the case that the accused party wanted forcibly to prevent the complainant party from filling up the gap in the boundary wall and so blocking the passage over the inner courtyard of the complainant's house. It would appear that the complainant, on learning that

Krishnapada Maity had filed a civil suit for declaration of the easement right of passing over the complainant's inner courtyard and had obtained an ex parte order for interim injunction restraining the complainant from blocking that passage, the complainant was trying to frustrate the Injunction before the notice of injunction could be formally served on him; and the accused wanted by use of force to prevent the complainant from thus frustrating the injunction order which he had obtained from the civil court on the previous day. The question is whether in such circumstances it can be said that the accused committed an offence of rioting. Mr. Banerjee has urged that the accused petitioners were trying not to enforce a right by the use of criminal force, which might involve their being members of an unlawful assembly in view of Clause (4) to Sec. 141 of the Indian Penal Code; but that they were trying to maintain a right which they already had. In this connection reference has been made to the decision *Ramnandan Prosad Singh v. Emperor*, 17 Cal WN 1132 where it was held that the phrase 'to enforce a right can only apply when the party claiming the right does not have possession over the subject of the right and therein lies the distinction between enforcing a right and maintaining a right; and that the party in possession is entitled to resist and repel an aggression, and his action in so doing would be in the maintenance of his right and would not amount to forming an unlawful assembly to enforce a right as defined in Section 141(4). In the course of the same case it was held that the entry by a party in spite of an injunction and decree of the civil court, upon a land belonging to another party, without that party's consent, amounts to criminal trespass with the intention to annoy the party in possession, and that in the circumstances there is a right of private defence against such criminal trespass.

10. In a decision by the Patna High Court *Ghyasuddin Ahmad v. Emperor*, ILR 11 Pat 523 : (AIR 1932 Pat 215) it was held that there is really no distinction between forming an assembly to enforce a right or a supposed right and forming an assembly to maintain forcibly an existing right. But as pointed out before, the decision of this High Court in 17 Cal WN 1132 and other cases has drawn a distinction between enforcing a right and maintaining an existing right. Both the Patna High Court and this High Court, however, are agreed on the point that unless a right to the exercise of private defence is established, the claim of right or it will not avail the accused. That was the view expressed in ILR 11 Pat 523 :

(AIR 1932 Pat 215) by the Patna High Court and that was also the view adopted in 17 Cal WN1132 by this High Court. It has been held also that where a party of men are determined to vindicate their right or supposed right by unlawful force and they engage in a fight with another party of men equally determined to vindicate their right or supposed right by unlawful force, no question of right of private defence can arise. Reference may be made to the case of Kabiruddin v. Emperor, ILR 35 Cal 368 and Maniruddin v. Emperor, ILR 35 Cal 384.

11. It is to be considered, therefore, whether in the present case it can be said that the accused petitioners were in possession of a right and whether there was an offence committed against them against which they could rightly exercise their right of private defence. As regards the first point, it is to be held that the right claimed by the accused petitioners was a disputed right. They were claiming a right of easement to pass over the inner courtyard of the complainant's house in order to have access to the tank of the complainant's homestead, and the complainant party was equally insistent that Krishnapada Maity's family did not have such a right, i. e. no right to pass over the inner courtyard. The fact that Krishnapada Maity filed a title suit for declaration of the right of easement would go to show that the right was disputed and it was not an existing undisputed right. The question is whether in such circumstances there was any offence committed, by the complainant party in trying to close the gap in the boundary with Mr. Banerjee has suggested that that offence of mischief was committed by the complainant party, but the boundary wall was being built by the complainant on his own land and there was no mischief being to any (sic) property of the accused, in the circumstances the act of the complainant could not come within the ambit of Section 425 I. P. C. which defines the offence of mischief. The question is whether (sic) of wrongful restraint was committed by the complainant. Section 339 of the Indian Penal Code defines wrongful restraint as voluntarily obstructing any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed. But the explanation of the Section provides that obstruction of a private way over a land or water which a person in good faith believes himself to have a lawful right to obstruct is not an offence within the meaning of the Section; in such a case the act of obstructing is not an offence of wrongful restraint. It is clear that in the present case the complainant party did not admit the

right of easement of Krishnapada Maity; and therefore, if they tried to obstruct user of the private pathway over the land of the complainant, it cannot be said that the complainant was committing an offence of wrongful restraint. Accordingly it is not possible to agree with the contention of Mr. Banerjee that the complainant party committed an offence against which the accused had the right of private defence. In the circumstances if the accused petitioners by means of criminal force, tried to enforce their right of keeping the pathway open by preventing erection of the boundary wall by the COMPLAINANT, their action would amount to an unlawful assembly and if force was used, the offence would amount to rioting.

12. Mr. Banerjee has urged that since the complainant did not come to the Court with a true case, on the finding of the learned Sessions Judge, Hooghly, the complainant should not be given an opportunity to change his case. It is true that the complainant, if the finding of the learned Sessions Judge is correct, did not come to the Court with a true case, in as much as, it appears that the gap in the boundary wall had not been closed on the 19th May, but it was being closed in the early morning of the 20th May. But it was the case of the accused petitioners themselves that 'the complainant party was trying to close the gap in the boundary wall in the early morning of the 20th of May, and if on that case, the accused committed an offence, the accused can be punished for such offence provided the accused has had the opportunity to meet that case. Since the charge of rioting as framed by the learned magistrate did not give notice of that case to the accused and that case was only brought out in the lower appellate Court, it is proper in our opinion, that the case should be tried out again after framing a fresh charge against the accused-petitioners of rioting in prosecution of the common object of enforcing their right to the user of a pathway over the Inner courtyard of the complainant by means of criminal force.

13. It is accordingly ordered that this Rule be made absolute to the above extent and the conviction of the accused petitioners and the sentence passed under Section 147 I. P. C. are set aside, and the accused be tried again by a Magistrate, First Class to be chosen by the S. D. O., Chandernagore, in respect of a charge under Section 147 of the Indian Penal Code with the common object as indicated above. In the meantime, the petitioners will continue on their present bail.

14. It should be observed that the learned magistrate trying the case afresh must decide the questions of fact for himself on the evidence adduced before him and will not be bound by any finding of fact which may have been arrived at by the learned Sessions judge in appeal or may have been assumed by this Court in delivering the above judgment.

Amaresh Roy, J.

15. I agree.

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